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No: 03-784

Supreme Court, U.S.
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In The
Supreme Court of The United States

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In the Interest of A.B., A Child.

Norean Hoots, L.S.W., of Cass County Social Services, and Monty Mertz, Guardian ad Litem, on behalf of A.B.,
Petitioners,

v.

K.B., F.B., and Turtle Mountain Band of Chippewa,
Respondents.

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On Petition For Writ of Certiorari
To The Supreme Court of The State of North Dakota

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# PETITIONERS' REPLY TO TRIBE'S BRIEF IN OPPOSITION

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## NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

1. Whether Petitioners may raise Tenth Amendment considerations in challenging the application of the Indian Child Welfare Act as unconstitutionally applied to the facts of this case.

2. Whether Petitioners have presented a justiciable issue for the Court's consideration.

3. Discrepancies regarding parties' statements of the case.

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## PETITIONER'S ARGUMENT IN REPLY TO NEW POINTS RAISED IN TRIBE'S BRIEF IN OPPOSITION

**1. Whether Petitioners may raise Tenth Amendment considerations in challenging the application of the Indian Child Welfare Act as unconstitutionally applied to the facts of this case.**

The Tribe asserts that a "States's rights under the Tenth Amendment are not violated when it accepts federal monies in exchange for complying with federal child welfare laws and policies." Tr. Br. in Opp. at 16. Petitioners, as AB's custodian and guardian ad litem respectively, have conscientiously and consistently presented the issues, especially the constitutional arguments, on behalf of the individual child, AB. Certainly AB, as an individual, is not deprived of her individual constitutional rights to procedural due process, substantive due process, or equal protection[1] based on any position a State takes with regard to receipt of federal monies.[2] Further, "[w]here

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[1]"The Tribe acknowledges that A.B. is entitled to due process of law and the equal protection of the law in North Dakota state courts." Tr. Br. in Opp. at 13. However, the Tribe fails to address a key issue in this regard, i.e., the proper level of scrutiny applied. It is Petitioners' position that strict scrutiny applies to the substantive due process and equal protection issues.

[2]The Tribe discusses the State's receipt of federal monies under Titles IV-B and IV-E of the Social Security Act. Tr. Br. in Opp. at 17. The Adoption and Safe Families Act amends the Social Security Act and directs permanency planning for all children in foster care and mandates the application for termination of parental rights of children who have been in foster care too long. 42 U.S.C. § 675(5). The Social Security Act does require a State, in order to be eligible for foster care payments, must have a plan for child welfare services which, inter alia, contains "a description, developed after consultation with tribal organizations ... in the State, of the specific measures taken by the State to comply with the Indian Child

Congress exceeds its authority relative to the States, ... the departure from the constitutional plan cannot be ratified by the 'consent' of state officials ... . State officials ... cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." New York v. United States, 505 U.S. 144, 182 (1992). "Congress exercises its conferred powers subject to the limitations contained in the Constitution." Id. at 156. The federal government has only limited and enumerated powers; thus, "what is not conferred, is withheld, and belongs to the state authorities." Id.; see also State of Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127, 135-138 (1947) (state may challenge constitutionality of statutory conditions on receipt of federal highway funds). Additionally, Congressional authority under the Indian commerce clause is not without limits. E.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding Congress lacks authority under Indian commerce clause to abrogate State's sovereign immunity). Thus, this Court properly may examine the Congressional action at issue here in light of Tenth Amendment, notwithstanding any express or implied consent attributable to state actors.

The Tribe also asserts that Congress has plenary authority to act with regard to Indian Tribes and suggests that Petitioners' analysis is "flawed" and "simplistic." Tr. Br. in Opp. at 19-20 (citing United States v. Mazurie, 419 U.S. 544 (1975) (finding federal authority under Indian commerce clause adequate to clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country); United States v. Kagama, 118

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Welfare Act ... ."42 U.S.C. § 622(b)(11). A State, and its agencies, must comply with ICWA; and CCSS does, to the best of its ability, comply with ICWA. The Social Security Act does not require any State administrative agency, or State Court, to ignore a child's independent constitutional rights or require a child to waive her constitutional rights.

U.S. 375 (1886) (discussing Congress' authority to address crime on reservations; noting Congressional abandonment of the treaty-making and move to govern the Tribes by acts of congress); and Morton v. Mancari, 417 U.S. 535 (1974) (examining employment criterion promoting Indian self government and limiting finding to facts of case). See also South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 342 (1998) (Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights). But, a closer look at these and other Indian law cases reveals a context of Congressional action vis a vis tribes as tribes.[3] Notwithstanding the special, paternalistic relationship between the federal government and tribes, it does not follow that Congress has unfettered authority to act vis a vis individuals such as AB, also a North Dakota and United States citizen, under various constitutional provisions, or vis a vis the States, especially when the Congressional act intrudes on authority reserved to the States and the people under the Tenth Amendment.

The Tribe concedes that child protection is an area historically left to exclusive state authority. Tr. Br. in Opp. at 17. It is absolutely appropriate for the Court to address and analyze the Tenth Amendment issue raised by Petitioners.

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[3]Until 1871, Indian tribes were recognized by the United States as akin to nations to the extent that treaties were entered. See Am.Jur. *Indians* § 55 (citations omitted). In 1871, Congress, by statute, declared the Indian tribes subject directly to the power and authority of the laws of the United States by the exercise of its legislative power over them, instead of by treaty. Id. (citations omitted). Since 1871, Indian affairs have been regulated by acts of Congress and by contracts with the Indian tribes. Id. (citations omitted). The United States, "as guardian of Indians, deals only with Indian nations, tribes, or bands, and does not enter into contracts, compacts, or treaties with individual Indians." Id. (citing Sac & Fox Indians v. Sac & Fox Indians, 220 U.S. 481 (1911); Blackfeather v. United States, 190 US 368 (1903)).

**2. Whether Petitioners have presented a justiciable issue for the Court's consideration.**

Although difficult to discern from the presentation, it appears the Tribe challenges Petitioners' standing and asserts the case is moot. Tr. Br. in Opp. at 14-15, 21-22. It is Petitioners' position that the issues presented are properly presented to the Court and that it is appropriate for the Court to review the same.

**a. Standing.**

The Tribe asserts that there is no equal protection violation of a child "who allegedly is receiving more rights than a non-Indian child similarly situated ... [and a] state agency does not experience an injury in fact sufficient to confer standing ... when its only 'loss' is the right to attempt to terminate the parental rights over a Indian child." This statement reveals the Tribe's misunderstanding of the law and facts of this case. First, the standard of review under an equal protection analysis based on a suspect classification is the same whether there is benign or invidious discrimination at issue. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227-229 (1995). It makes no sense to assert that since AB is supposedly getting more favorable treatment under ICWA, then no scrutiny or analysis need take place at all. See id. Secondly, to suggest that CCSS only looks to exercise a "right to attempt to terminate parental rights" and thus suffers no injury in fact is offensive.

CCSS is obligated by state and federal law to pursue a termination of parental rights in certain circumstances. N.D.C.C. § 27-20-20.1 (set out in Appendix at 109); Adoption and Safe Families Act, Pub. Law 105-89, Sec. 103 (pertinent part set out in Appendix at 64) (codified at 42 U.S.C. § 675(5)(E)) (both identifying critical time element regarding permanency planning for children in foster care). This obligation flows from the North Dakota Legislature's and

United State's Congress' recognition that a child has an independent right to and interest in health, safety, well-being, and permanency, and that a child need not indefinitely languish in legal limbo for parties, (i.e., their parents, and, in this case, the Tribe), to get their acts together. This is not a case, as Respondent would characterize, about mistreatment of a tribal member or trespass on a Tribe's rights as a quasi-sovereign[4] nation. This is a case about a child who needed someone to immediately take care of her basic needs for food, shelter, clothing, education, and counseling, and her long term need for stability and permanence. At some point, a balancing of the interests between the child, the parents, and the Tribe, must occur, and in this case, CCSS and the guardian ad litem speak for the child. At some point, the parents' dereliction of duty will justify a termination of parental rights. In the Interest of N.H. and B.H., 2001 ND 143, ¶17, 632 N.W.2d 451 (parental "rights are not absolute or unconditional, and parents must provide care that satisfies minimum community standards," and a "child's health and safety are the paramount concern"). At some point, the Tribe's acquiescence and delay will justify the denial of a motion for transfer of jurisdiction. E.g., In re Interest of C.W., 479 N.W.2d 105, 112 (Neb. 1992) (finding good cause to deny transfer where, inter alia, tribe delayed intervention). When the interests to be balanced involve substantive due process issues and/or equal protection issues based on genetically based classification, a strict scrutiny analysis must be applied.

Petitioners recognize the general rule that a litigant may not normally assert the constitutional rights of persons not before the Court. But, AB is before the Court. As previously stated, Petitioners, as AB's custodian and guardian ad litem respectively, have conscientiously and consistently presented

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[4]United States v. Kagama, 118 U.S. 375, 382 (1886) (noting tribes are "neither states nor nations, [and have] only some of the attributes of sovereignty") (emphasis added).

the constitutional arguments on behalf of the individual child, AB. The original action is necessarily brought in her interest. N.D.C.C. § 27-20-08(3) ("The petition ... must be entitled 'In the interest of ___, a child.") (set out in full in the Appendix at 102). The Court should recognize that it is the child's direct standing and personal injury that is truly at issue. Alternatively, the Court may recognize that in some circumstances litigants, (here, CCSS and the guardian ad litem), may assert a third party's, (here, AB's), constitutional rights. E.g., Barrows v. Jackson, 346 U.S. 249 (1953). This is especially so when there is a special relationship between the litigant and the third party and the litigant is an effective proponent of the third party's rights. See Singleton v. Wulff, 428 U.S. 106 (1976); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

The Tribe also asserts that because Petitioners did not seek a stay of the North Dakota Supreme Court decision, AB's right to judicial review by the United States Supreme Court has evaporated. Tr. Br. in Opp. at 21-22. Court's do not require the doing of a vain, useless, or futile thing. E.g., Fargo Public Library v. City of Fargo Urban Renewal, 185 N.W.2d 500 (N.D. 1971) (citing N.D.C.C. § 31-11-05(23) ("The law neither does nor requires idle acts.")) (other citations omitted). Given the clear statements of the North Dakota Supreme Court in this matter regarding the application of ICWA and granting transfer of jurisdiction and dismissal, (albeit Petitioners' position that the holdings are in error), and that court's refusal to reconsider the matter, it would have been pointless to ask the North Dakota Supreme Court for a stay. In the Interest of A.B., 663 N.W.2d 625 (N.D. June 17, 2003) (rehearing denied August 20, 2003). In any event, Petitioners' decision to not request a stay does not deprive the United States Supreme Court jurisdiction in the matter nor prohibit the Court from exercising judicial review.

**b. Mootness.**

The general rule is that an actual controversy must exist at all stages of appellate review, and not just when the action is initiated. Roe v. Wade, 410 U.S. 113, 125 (1973) (citations

omitted). But where circumstances justify, an issue is not moot if "capable of repetition, yet evading review." Id. (citing Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)) (other citations omitted). Under the Tribes's rationale, AB is not now nor ever entitled to judicial review of whether her constitutional rights have been violated because of the alleged recent/subsequent denomination as a ward of the Tribal Court.[5] Tr. Br. in Opp. at 21-22. The constitutionality of the application of the ICWA to AB by the State's court system is open to challenge. AB is a member of the class of people affected by the presently written statutes and their application is capable of repetition, yet evading review. See Dunn v. Blumstein, 405 U.S. 330, 334 n.2 (1972) (finding appellee had standing to challenge residence requirements regarding right to vote as a member of the class of people affected by the presently written statute, noting the problems to voters posed by the Tennessee residence requirements is "capable of repetition, yet evading review") (citing Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). In this case, just as in Dunn v. Blumstein, "the laws in question remain on the books," and is therefore

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[5]The Tribe also asserts that the Tribal Court had been exercising jurisdiction of AB since 1995 when the grandmother was allegedly granted custody of AB by the Tribal Court. Tr. Br. in Opp. at 22. It is unclear if the Tribe is at this late date suggesting that it held exclusive jurisdiction since the inception of the child's placement with CCSS in March of 2001, when the child was removed from the mother, KB, not the grandmother, HL. Nor does the Tribe here, nor any time previously on the record below, try to explain (1) how a tribal court can enter a custodial order over a non-tribal member, KB, regarding custody of an at least then non-tribal member, AB; or (2) why it did not affirmatively act with regard to the child, in the state proceedings until February of 2002, when it made its first motion to intervene and for transfer of jurisdiction, which the mother vetoed. If in fact the Tribe believed that during the pendency of the proceedings below that the Tribe had exclusive jurisdiction, it never did assert exclusive jurisdiction nor did it properly raise that issue below. The Tribe should be estopped from raising the issue at this time.

capable of repetition, yet evading review. This case is like Dunn in that AB is challenging the constitutionality of the statute at issue.

Further, AB is still a minor child having been born on May 1, 1993. She remains deprived by her parents and is harmed by lack of permanency. See In the Interest of J.P. and D.P., 2004 ND 25, 674 N.W.2d 273 (affirming termination of parental rights of KB with respect to AB's siblings, JP and DP; specifically noting that likelihood of harm was proven beyond a reasonable doubt as required by the ICWA). AB, as a minor child, is entitled to the protection afforded similarly situated children under state and federal child protection laws, and still subject to application of ICWA, and thus entitled to judicial review. See Honig v. Doe, 484 U.S. 305 (1988) (plaintiffs were asserting their rights under the EHA, but not challenging the constitutionality of the legislation itself; Court concluded that twenty year old maintained standing because he was still entitled to benefits under the subject legislation). This case is like Honig in that AB is still a minor and still covered by the ICWA and state and federal child protection laws. Given AB's tumultuous childhood, history of multiple placements, and identified emotional, behavioral, and academic needs, see Pet. for Writ of Cert. at 2, it is not reasonable to suppose that AB's current or future placements will so perfectly suit her emotional, behavioral, and academic needs that further disruption in placement are improbable or return to a state foster care system unlikely. Cf. Honig, 484 U.S. at 320.

The Tribe also suggests that the case is moot because no ruling from the United States Supreme Court could restore jurisdiction back to the North Dakota courts because there is no legal way for the Tribal Court to be forced by North Dakota courts to restore jurisdiction to them over an Indian child. Tr. Br. in Opp. at 1-4, 22. This argument is a circular and again intimates that the Tribe does not concede that AB is entitled to constitutional protections, and that the Tribe does not concede that the United States Supreme Court is the final arbiter of the

constitutionality of statutes. Is the courthouse door open only to tribes who want United States Supreme Court review, but closed in every case where the tribe has prevailed below? The United States Supreme Court has the final say on, as well as the duty to declare, the constitutionality of a statute. Marbury v. Madison, 1 Cranch 137 (1903). The Court may also rule regarding proper application of federal statues, including ICWA. As a dependent-sovereign, the Tribe is not in a position to disrespect a ruling or mandate of the United States Supreme Court. The Tribe in inherently subject to the power of the United States Supreme Court. See United States v. Kagama, 118 U.S. 375 (1886).[6]

**3. Discrepancies regarding parties' statements of the case.**

Petitioners do take issue with several statements made by the Tribe in its statement of the case. See Tr. Br. in Opp. at 1-4, e.g., regarding timing and form of notification; issues regarding placement and removal from AB's grandmother; etc.[7]

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[6] In United States v. Kagama, 118 U.S. 375 (1886), the Court noted that "soil and the people" within the geographical limits of the United States are under the political control of the government of the United States. With regard to the Tribes, the Court stated that "[t]hey were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty." Id. Further, the "tribes are the wards of the nation. ... dependent on the United States, ... dependent for their political rights." Id. Therefore, "there arises the duty of protection, and with it the power ... [which] has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen. Id. (emphasis added). See also *infra* note 3 (discussing tribal subordinance to federal government).

[7] The Tribe also comments regarding "Tribal Court's agreement to conduct proceedings in Fargo" in response to the forum non conveniens issue raised below. T. Br. in Opp. at 2. This was raised orally by the Tribe's counsel at the evidentiary hearing before the Referee and again at the North Dakota Supreme Court arguments. This alleged agreement was

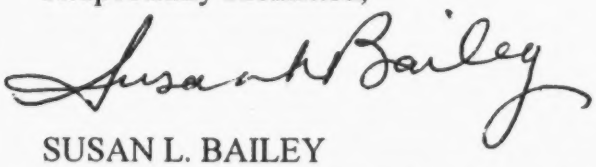
Petitioners here want to acknowledge, and to the extent necessary preserve the issues in dispute, but note that the minor factual discrepancies are secondary to the key and prominent legal issues presented to the Court for review at this preliminary point of consideration.

## CONCLUSION

For the reasons set out above, in addition to the reasons set out in the Petition itself, the Petition for Writ of Certiorari to the Supreme Court of the State of North Dakota should be granted.

Dated this 24th day of March, 2004.

Respectfully submitted,



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never documented by Tribal Court order, memorandum, or letter. Such hearing in the Fargo area in fact never happened, notwithstanding the North Dakota Supreme Court's apparent reliance in part on the representation.